IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL WRIT No. 2550 of 2006

SMT.BASANTI DEVI
V/S
A.C.J.(S.D.)NO.1,CHITTORGARH & ORS.

Mr. SL JAIN, for the appellant / petitioner

Date of Order : 13.7.2007

HON'BLE SHRI N P GUPTA,J.

ORDER

Heard learned counsel for the petitioner, perused the impugned order.

The learned trial Court has dismissed the petitioner's application dated 27.4.2006, purportedly filed under Order 8 Rule 1A and Section 151 CPC, and at the same time, has ordered the existing issue No.2 to be struck off, and has framed different additional issue No.2, and has also struck off para 1 of the additional pleas of the written-statement.

It is contended by learned counsel for the petitioner, that in para 1 of the additional pleas, the petitioner had clearly contended, that the suit property is of the temple Rundeshwar Mahadev, and the plaintiff, in individual capacity, has no right to institute the suit. It was pointed out, that plaintiff Nana Lal died, and

application was filed for substitution of legal representatives, and thereupon the matter came to this Court, and this Court while deciding that revision, vide order dated 12.11.2002, had noticed, that issue has been framed to the effect that if the property belongs to temple Rundeshwar, whether the suit could have been filed in individual capacity by Nana Lal, and has observed, that the issue, as to whether the suit could have been filed in an individual capacity by Nana Lal is yet to be decided. It is submitted that in view of these observations, it is clear, that neither the pleading contained in para 1 of additional plea, could be struck off, nor the issue No.2, as originally framed, could be struck off. It could not be said that the pleading contained in para 1 of the additional plea is covered by any provisions of Order 6 Rule 16, so as to entitle the Court to strike it out. Reliance was placed on judgment of Hon'ble the Supreme Court, in Sathi Vijay Kumar Vs. Tota Singh & Ors., reported in 2007 AIR SCW 304, to contend, that the power under Order 6 Rule 16 should be sparingly exercised. The next submission made is, that the petitioner had filed the documents, which are the certified copies, and which clearly establish, that the property is of the temple, and simply by error, those documents could not be exhibited, interest of justice requires, that permission should have been granted to exhibit those documents, and the mere fact that earlier they could not be exhibited, should be no

ground to refuse the prayer, and for that purpose reliance was placed on judgment of this Court, in Jodhpur Gums & Chemicals Pvt. Ltd. Vs. Punjab National Bank & Ors., reported in AIR 1999 Rajasthan 38. Then it was submitted, that when the learned trial Court has framed additional issue No.2 about the status of the petitioner, to be in possession of the property, as tenant, the petitioner was required to be given opportunity to lead evidence to prove this issue, as the burden is placed on the petitioner.

I have considered the submissions. Vide order dated 18.5.2006, the record of the learned trial Court had been requisitioned, and that has been perused by me. I also requisitioned from the registry, the file of S.B. Civil Revision No. 642 decided on 12.11.02, and have perused that also.

A look at the application filed by the petitioner, on 27.4.2006, shows that it has been pleaded therein, that the plaintiff has filed the suit alleging the property to be of Rundeshwar Mahadev, and claiming himself to be Pujari and the property being under mortgage, while the defendant has denied the factum of mortgage, so also about the plaintiff being Pujari, and that the Pujari was Chenram, who had obtained the Patta of this shop from the Municipality and raised construction with due permission, and since the petitioner came to know of these documents

later on, certified copy was obtained and produced, and therefore, they could not be marked exhibit, while they are important documents for deciding the case, therefore, they should be permitted to be marked exhibit, and for that purpose, the petitioner should be allowed to lead evidence, and that these documents remained in the file by oversight, and therefore, the application could not be filed earlier.

A proper reading of this application does show, that the case of the petitioner is, that certified copies of the documents were obtained after the plaintiff's evidence was over, as they came to the notice subsequently, and that, by oversight they could not be proved earlier, i.e. after production of the documents, and should be allowed to be proved now.

It may be noticed here, that a look at the record shows, that the last lot of document produced by the petitioner is on 16.9.2002, while the affidavit of the petitioner has been produced as late as on 9.12.2002. In that view of the matter, it cannot be said, that the stand taken by the petitioner in the application is at all entitle to any credence.

It may also be observed at this place, that subsequently, the petitioner has also produced certain documents on 11.8.2003, and a look at the order-sheets of

the lower court's file shows, that these documents were filed alongwith the application under Order 6 Rule 17, for amendment of the written-statement, and a look at that application, available at page B 87/1 shows, that thereby the petitioner wanted to add a specific plea, about the property being of Rundeshwar Mahadev, being a public trust, being not registered, and the Pujari of the said temple Chenram having died issueless, of which the plaintiff is not the heir, and therefore, the plaintiff is not entitled to file the suit. It is significant to note, that this application has been dismissed by the learned trial Court vide order dated 17.2.2004, with a cost of Rs. 200/-, and that order has not been challenged. In that view of the matter, when the plea sought to be raised was not allowed to be raised, the documents produced to support that plea cannot be allowed to be proved, in the garb of the present application. This is one aspect of the matter.

The other aspect of the matter is, that in the written-statement, it is nowhere the case of the petitioner, that the property is of the temple Rundeshwar Mahadev, rather the plea taken in the written-statement is, that the plaintiff claims the property to be of Rundeshwar Mahadev (**वादी इस दूकान को मन्दिर रूण्डेश्वर महादेव के स्वामीत्व की बताकर आया है इसलिये वादी को यह वाद पत्र लाने का अधिकार नहीं है।**). In that view of the matter, in absence of it ever being the case of the petitioner, in the pleading, about the property being of

temple, the document sought to be marked exhibit, cannot be said to be having any relevance, more so, on the face of the order dated 17.2.2004, dismissing the application for amendment.

Then coming to the question of striking out the para 1 of additional pleas, so also striking out issue No.2, as originally framed. True it is that issue No.2 was framed in view of the pleading contained in para 1 of the additional pleas, but then, a bare reading of the pleading, and issues, shows that all that it comprehended was the stand of the plaintiff to have come in the Court with the plea, about the property being of Rundeshwar Mahadev, obviously for that purpose, only the pleadings were required to be read, and no evidence was required to be led, and therefore, issue was rightly struck off, as in the garb of this issue, avoidable complications were sought to be introduced by the petitioner. Then so far striking out of the pleading is concerned, since the whole thrust of the plea is about the plaintiff having come with this case, while I did not find any such pleading to be there in the plaint, and to be better sure, I requested learned counsel also, to assist the Court in reading plaint, and to point out, if there is some pleading, but the learned counsel, despite all his best efforts, could not. In that view of the matter, the pleading is no better than just unnecessary, and since as observed above, in the garb of

this pleading, unnecessary complications are attempted to be introduced, it has rightly been struck out by the learned trial Court. So far as the judgment of Hon'ble the Supreme Court, in Sathi Vijay Kumar's case is concerned, that does not help the petitioner. That was a case of Election Petition, and after considering the pleadings it was found that they did not require to be struck off, and in that background the observations, pressed into service by the learned counsel for the petitioner were made, while in the present case, as found above, it was an imminently fit case, where the pleading was required to be struck off, and has thus rightly been struck off.

So far as the order of this Court dated 12.11.2002, while deciding that revision, having noticed, that issue has been framed to the effect that if the property belongs to temple Rundeshwar, whether the suit could have been filed in individual capacity by Nana Lal, and having observed, that the issue, as to whether the suit could have been filed in an individual capacity by Nana Lal is yet to be decided, is concerned, a look at the memo of revision itself does show that a deliberately wrong statement had been made therein, to the effect, that **"The averments made in the plaint were that the plaintiff has mortgaged one shop on 10.1.83 belongs to the temple Shri Rindeshwar Mahadeo for a sum of Rs. 5000/- …….."**. and it is writ large that on this basis submissions must have been

made, and relying upon the submission the above observations have been made, while as noticed above, even despite specific request made by me the learned counsel for the petitioner, despite his best efforts, could not point out any such pleading in the plaint. Thus no advantage can be allowed to be gained by the petitioner, from the said observations.

Then coming to the question of framing of the additional issue, it may be observed, that the issues were required to be framed on the basis of the pleadings, and the petitioner has come with the categoric case, about being in possession of the property as a tenant, and not as a mortgagee. In that view of the matter, on the face of the language of Order 14 Rule 5, it is clear, that it is always (at any time before passing a decree) open to the learned trial Court, to amend the issue, or frame additional issues, as it thinks fit. Therefore, since the issue arises from the pleadings, it cannot be said that it could not have been framed.

Then so far as the right of the petitioner to lead evidence, on this issue is concerned, I have gone through the record, and find, that the plaintiff has already led evidence on this aspect, i.e. about her being in possession of the property, not in the capacity of mortgagee, but as a tenant. The evidence comprises of the

petitioner herself, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6. At this stage, it may be noticed, that as appears from the order-sheets, that the evidence of the parties was over way-back on 22.7.2005, and the case was fixed for final arguments on 9.8.2005, and since then, after seeking about much more than a dozen adjournments for final arguments, on one pretext or the other, the present application has been filed.

In my view, when the Court has the power, to suo motu amend or frame any additional issues, at any time before passing a decree, when the case was going on for final arguments for all this time, simply because the Court thought it appropriate to frame an additional issue, before hearing final arguments, when the petitioner has already led evidence on that issue, it cannot be said, that the petitioner has a right of leading any further evidence on this issue.

Thus, taken from any standpoint, I do not find any error in the impugned order. The writ petition is, therefore, dismissed summarily. Record of the learned trial Court be returned forthwith. Since the case is already very old, as appears from the order-sheets, being suit of 1996, learned trial Court is directed to expeditiously decide the main suit.

(N P GUPTA),J.

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